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2014 OCT 17 P 4: 18

AZ CORP COMMISSION
DOCKET CONTROL

Arizona Corporation Commission

DOCKETED

OCT 17 2014

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BEFORE THE ARIZONA CORPORATION COMMISSION

IN THE MATTER OF THE FORMAL
COMPLAINT AGAINST BLACK
MOUNTAIN SEWER CORPORATION
FILED BY CAREFREE 34 INC. / OFFICE
ON EASY STREET, INC. dba VENUES
CAFE.

DOCKET NO: SW-02361A-13-0359

**MOTION TO COMPEL RESPONSES
TO DATA REQUESTS**

(EXPEDITED RULING REQUESTED)

Liberty Utilities (Black Mountain Sewer) Corp. f/k/a Black Mountain Sewer Corporation ("Liberty") hereby seeks an order from the Commission compelling Carefree 34 Inc./Office on Easy Street, Inc. dba Venues Café (the "Café") to immediately and fully respond to Liberty's Second Set of Data Requests. Hearing on the Café's complaint is scheduled for October 28, 2014 and the Café's refusal to timely respond to discovery undermines Liberty's rights to due process. This Motion is supported by the following facts and argument.

A. Factual Background.

On October 1, 2014, Liberty sent to the Café, via electronic and U.S. mail, a Second Set of Data Requests.¹ Liberty requested responses on or before October 8, 2014.² The Café acknowledged receipt of the data requests on October 3, meanwhile

¹ See Exhibit A.

² The procedural orders issued in this matter do not set a time for responding to data requests. Since hearing in this matter is merely weeks away, Liberty requested a response within 7 calendar days, which is consistent with normal practice and procedure in other cases before the Commission.

1 indicating that complying with the October 8 deadline might prove problematic.
2 To accommodate the Café, Liberty's counsel agreed to an extension until October 13 –
3 affording the Café 5 additional days – a sum total of 12 days after the data requests were
4 initially served.

5 The responses ultimately supplied by the Café (attached as **Exhibit B**) are entirely
6 inadequate. For example, Liberty sought a listing of the Café's potential witnesses and
7 exhibits for hearing less than two weeks away. The Café's response was "[u]nknown as
8 of this date."³ Liberty also asked whether the Café had paid the amount it was billed for
9 sewer utility service. The Café responded that it was waiting for "legal advise [sic]."⁴

10 To date, no responses have been provided. Liberty's counsel attempted to resolve
11 the issue without resorting to filing this motion. The Café claimed it was too busy to
12 respond to the data requests.⁵

13 **B. Argument and Relief Requested.**

14 The Café did not timely object to any of the data requests; rather, the Café is
15 simply refusing to answer discovery. Liberty is seeking basic information from the party
16 that filed a complaint against it. The Café is clearly obligated to identify its witnesses and
17 exhibits before an evidentiary hearing, as well as answer basic questions about its
18 allegations. The Café's refusal to do so directly threatens the Company's right to due
19 process and a fair hearing.

20
21
22 ³ Liberty Data Request 2.1 and the Café's response are attached as **Exhibit B**.

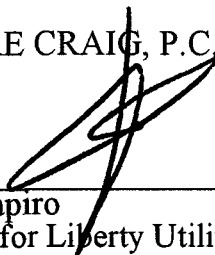
23 ⁴ Liberty Data Request 2.7 and the Café's response are attached as **Exhibit B**. Notably,
24 no attorney has made an appearance on the Café's behalf in this proceeding.

25 ⁵ See e.g., e-mail correspondence between the parties attached as **Exhibit C** ("... the
26 'Season' is starting in Carefree and our calendar is dictated by Community events much of
which we have zero control [sic] and/or dates were scheduled long before we knew about
this hearing.").

1 Liberty, therefore, requests that the ALJ immediately issue an order compelling the
2 Café to respond fully to Liberty's Second Set of Data Requests. That response should be
3 provided no later than Noon, Tuesday, October 21, 2014, which is only one week from the
4 hearing in this matter. In the absence of a complete and timely response, an order
5 dismissing this matter should issue.

6 RESPECTFULLY SUBMITTED this 17th day of October, 2014.

7 FENNEMORE CRAIG, P.C.
8

9 By 
10 Jay L. Shapiro
11 Attorneys for Liberty Utilities (Black Mountain
Sewer) Corp.

12 **ORIGINAL** and thirteen (13) copies
13 of the foregoing were filed
this 17th day of October, 2014, with:

14 Docket Control
15 Arizona Corporation Commission
1200 W. Washington Street
Phoenix, AZ 85007

16 **Copy of the foregoing was hand delivered**
17 this 17th day of October, 2014, with:

18 Marc Stern, ALJ
19 Hearing Division
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, AZ 85007

21 Robin Mitchell, Esq.
22 Legal Division
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, AZ 85007
24
25
26

1 **Copy of the foregoing mailed/e-mailed**
2 **this 17th day of October, 2014, to:**

3 Al Swanson
4 Catherine Marr
5 Venues Café
6 34 Easy Street
7 Carefree, AZ 85377-2000

8 By: 

9 9638519.1/035227.0003

EXHIBIT A

FENNEMORE CRAIG, P.C.

2394 East Camelback Road, Suite 600
Phoenix, Arizona 85016
(602) 916-5000

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Direct Phone: (602) 916-5366
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jshapiro@fclaw.com

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Las Vegas (702) 692-8000
Reno (775) 786-5000
Denver (303) 291-3200

October 1, 2014

Via Electronic and U.S. Mail

Al Swanson
Catherine Marr
Venues Café
34 Easy Street
Carefree, AZ 85377

Re: Liberty Utilities (Black Mountain Sewer) Corp. f/k/a Black Mountain Sewer Corporation; ACC Docket No. SW-02361A-13-0359

Dear Mr. Swanson and Ms. Marr:

Enclosed is Liberty Utilities (Black Mountain Sewer) Corp. f/k/a Black Mountain Sewer Corporation's ("BMSC" or "Company") Second Set of Data Requests to the Carefree 34 Inc./Office on Easy Street Inc. dba Venues Café ("Café") in the above-referenced docket number. The following definitions and instructions are intended to be applicable in all discovery matters in this proceeding.

Definitions

"Document" includes all written matter of every kind and description, whether draft or final, original or reproduction, including but not limited to, correspondence, memoranda, notes, transcripts, contracts, agreements, memoranda of telephone conversations or personal conversations, notices, reports, rules, regulations, facsimile messages, minutes of meetings, interoffice communications, reports, tapes for visual or audio reproduction, drawings, graphs, charts, electronic mail message, and other compilations from which information can be obtained. The term "document" includes all copies of the document which contain any additional writing, underlining, notes, deletions, or any other markings or notations, or otherwise not identical copies of the original.

"Exhibit" means a document or object introduced as evidence.

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"Identify" when used in referring to a person, shall mean to state the following with regard to the person: (a) name; (b) last known address; (c) residence and business telephone numbers; (d) relationship to you; and (e) occupation at the date of these data requests.

"Identify" and "identity" with respect to a document mean to state the name or title of the document, the type of document (e.g., letter, memorandum, telegram, computer input or output, chart, etc.), its date, the person(s) who authored it, the person(s) who signed it, the person(s) to whom it was addressed, the person(s) to whom it was sent, its general subject matter, its present location, and its present custodian. If any such document was in your or your witnesses' possession or subject to your control, but is no longer, state what disposition was made of it and explain the circumstances surrounding, and the authorization for, such disposition, and state the date or approximate date of such disposition.

"List," "describe," "explain," "specify" or "state" shall mean to set forth fully, in detail, and unambiguously each and every fact of which you or your witnesses have knowledge which is relevant to the answer called for by the data request.

Instructions

In responding to these Data Requests, please indicate the person or persons responsible for the compilation of the information provided in response to each request.

Included within this set of Data Requests may be Requests for Admission. A request will be deemed admitted unless you provide a specific denial thereof or a written objection and the reasons therefore, or a statement explaining why you can neither admit nor deny. If you deny or fail to admit any of the attached Requests for Admission or any portion thereof, for each denial or failure to admit you must:

a. State each and every fact that supports or tends to support the denial of the specific Request for Admission;

b. State the name, address, and telephone number of each and every person who has personal knowledge of the facts alleged in your answer to (a) above;

c. Identify with sufficient particularity each and every document, memorandum, or writing of any kind that substantiates or tends to substantiate the facts alleged in subpart (a) above;

d. If you answer any Request for Admission by stating that it lacks information or knowledge as to a reason for the failure to admit or deny, state specifically what "reasonable" inquiry was made to obtain sufficient information to enable you to admit or deny such request for admission;

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e. If you can admit a portion of said request for admission, please indicate the portion which you admit; and

f. State the legal authority which supports said denial.

If any information is withheld under claim of privilege, confidentiality or proprietary trade secret, you are required to: (1) identify in writing such information with sufficient particularity as to permit the Commission to make a full determination as to whether the claim or privilege is valid; (2) identify the nature of the privilege(s) asserted; and (3) identify the factual basis of the claim of privilege.

These Data Requests are intended to be continuing in nature. Accordingly, the Café is requested to supplement prior responses if it receives or generates additional information, reports or other data within the scope of any of the Data Requests between the time of the original response and the hearing.

The Café's full and complete responses are due within seven (7) calendar days, or **Wednesday, October 8, 2014**. Please direct one copy of your responses as well as the documents responsive to these requests directly to each of the following people:

1. Greg Sorensen, Liberty Utilities (Black Mountain Sewer) Corp., 12725 W. Indian School Road, Suite D-101, Avondale, AZ 85392. E-mail: greg.sorensen@libertyutilities.com.
2. Jay Shapiro/Whitney Birk, Fennemore Craig, 2394 E. Camelback Road, Suite 600, Phoenix, AZ 85016. Email: jshapiro@fcclaw.com; wbirk@fcclaw.com.

If you have any questions, please do not hesitate to contact me at any time.

Very truly yours,

Whitney Birk
paralegal

Jay L. Shapiro

Enclosure

cc: Greg Sorensen

**SECOND SET OF DATA REQUESTS
FROM LIBERTY UTILITIES (BLACK MOUNTAIN SEWER) CORP.
F/K/A BLACK MOUNTAIN SEWER CORPORATION
TO CAREFREE 34 INC./OFFICE ON EASY STREET, INC.
DBA VENUES CAFÉ**

Docket No. SW-02361A-13-0359

October 1, 2014

- 2.1. Please identify the names of any and all witnesses the Café plans to call at hearing in this matter.
- 2.2. For any and all witnesses identified in response to Data Request 2.1, please identify the subject matter of their testimonies.
- 2.3. For any and all expert witnesses identified in response to Data Request 2.1, please provide a copy of each witness' resume and/or curriculum vitae, and a copy of any and all reports prepared by such witness.
- 2.4. Please provide a listing of any and all exhibits that the Café intends to use at hearing. Note: the documents produced in response to BMSC's first set of data requests do not have to be produced again.
- 2.5. Admit that BMSC has billed the Café since April 1, 2013 consistent with its tariff approved by the Commission in Decision No. 71865 (September 1, 2010). If you deny this data request, in whole or in part, please state the basis for such denial with specificity.
- 2.6. Admit that all Restaurants served by BMSC are billed based on the number of chairs in the establishment. If you deny this data request, in whole or in part, please state the basis for such denial with specificity.
- 2.7. Admit that the Café has not been paying the bills it has received from BMSC and now owes the Company in excess of \$9000. If you deny this data request, in whole or in part, please state the basis for such denial with specificity.

EXHIBIT B

SECOND SET OF DATA REQUESTS
TO: LIBERTY UTILITIES (BLACK MOUNTAIN SEWER) CORP.
F/K/A BLACK MOUNTAIN SEWER CORPORATION
FROM : CAREFREE 34 INC./OFFICE ON EASY STREET, INC.
DBA VENUES CAFÉ

Docket No. SW-02361A-13-0359

October 12, 2014

- 2.1. Please identify the names of any and all witnesses the Café plans to call at hearing in this matter. Unknown as of this date.
- 2.2. For any and all witnesses identified in response to Data Request 2.1, please identify the subject matter of their testimonies. Unknown as of this date.
- 2.3. For any and all expert witnesses identified in response to Data Request 2.1, please provide a copy of each witness' resume and/or curriculum vitae, and a copy of any and all reports prepared by such witness. Unknown as of this date.
- 2.4. Please provide a listing of any and all exhibits that the Café intends to use at hearing. Note: the documents produced in response to BMSC's first set of data requests do not have to be produced again. Unknown exhibits as of this date.
- 2.5. Admit that BMSC has billed the Café since April 1, 2013 consistent with its tariff approved by the Commission in Decision No. 71865 (September 1, 2010). If you deny this data request, in whole or in part, please state the basis for such denial with specificity. Unknown response as of this date, pending legal advise.
- 2.6. Admit that all Restaurants served by BMSC are billed based on the number of chairs in the establishment. If you deny this data request, in whole or in part, please state the basis for such denial with specificity. Unknown as of this date.
- 2.7. Admit that the Café has not been paying the bills it has received from BMSC and now owes the Company in excess of \$9000. If you deny this data request, in whole or in part, please state the basis for such denial with specificity. Unknown response as of this date, pending legal advise.

EXHIBIT C

From: Venues Cafe <venuescafe@gmail.com>
Sent: Thursday, October 16, 2014 6:55 AM
To: SHAPIRO, JAY
Cc: BIRK, WHITNEY; Robin Mitchell; SHAPIRO, JAY
Subject: Re: BMSC (13-0359) - Continuance

Please forgive us, the "Season" is starting in Carefree and our calendar is dictated by Community events much of which we have zero control and/or dates were scheduled long before we knew about this hearing.

Again, we are requesting you to agree to a continuance...

Sent from an iPad; please excuse Apple's automated typos...

On Oct 14, 2014, at 12:52 PM, "SHAPIRO, JAY" <JSHAPIRO@FCLAW.COM> wrote:

Ms Marr - I am not going to argue with you. The fact is that you have chosen to file a complaint and as such have a burden to respond to discovery in a timely way. These questions are not complicated - you should know who you are calling at a hearing in two weeks and you certainly know whether you have paid your bill. Therefore, if you do not comply by Noon tomorrow, which is more than two weeks after the data requests were served, we will file a motion to compel.

Thx,

Jay

On Oct 14, 2014, at 12:33, "Venues Cafe" <venuescafe@gmail.com> wrote:

Mr. Shapiro,

Regrettably, we do not have the resources of a USD 1.8 B market valued company who pass their legal costs through to their customers. Obviously, we do not have a staff of legal assistants, with a vast library of templates at our disposal to respond to your questions.

We have a small business to run and must attend to the needs of our customers or we will not need a sewer connection.

We were content to wait for the Commission's decision on this matter until your client initiated notice to disconnect service; we had no choice but to request assistance from Judge Stern. If you would like to stipulate to a continuance to enable us an opportunity to reintroduce the obvious, we are willing to stipulate to a continuance until the commission makes their ruling.

Please advise.

Thank you!

Sent from an iPad; please excuse Apple's automated typos...

On Oct 14, 2014, at 11:19 AM, "SHAPIRO, JAY"
<JSHAPIRO@FCLAW.COM> wrote:

Ms. Marr - your responses to our data requests are entirely inadequate. When you asked for more time, we were not aware it was so you could provide totally non-responsive answers.

In short, you are the plaintiff, you sought to have the hearing rescheduled, and now claim to lack basic information about your claims. Such responses directly threaten the Company's right to due process and a fair hearing. In the spirit of cooperation, we are asking you to provide complete and accurate responses to the Company's data requests by Noon tomorrow (10/15/14). Absent that, we will likely be left with no choice except to seek the immediate intervention of the presiding Judge.

Thx,

Jay

On Oct 13, 2014, at 5:07 PM, "Catherine Marr"
<venuescafe@gmail.com> wrote:

Mr. Shapiro,

Attached is our response, along with our data requests.

Thank you...

Venues Café
(480) 595-9909

On Fri, Oct 3, 2014 at 8:27 PM, SHAPIRO, JAY
<JSHAPIRO@fclaw.com> wrote:
We can agree to an extension of the response deadline. Will October 13 work?

Thx,

Jay

On Oct 3, 2014, at 15:00, "Catherine Marr"
<venuescafe@gmail.com> wrote:

Sorry folks; at the moment half of us are in Connecticut on a previously scheduled business trip, with airplane reservations back to Arizona on Tuesday, October 7th. We I'll do the best we can to comply with your request, but so far we have not had an opportunity to discuss your request.

Thanks for understanding...

Sent from an iPad; please excuse Apple's automated typos...

On Oct 1, 2014, at 2:08 PM, "BIRK, WHITNEY"
<WBIRK@FCLAW.com> wrote:

Mr. Swanson and Ms.
Marr:

Attached is BMSC's second set of data requests to Venues Café. Since hearing in this matter is just weeks away, BMSC requests the Café's responses within 7 calendar days, or by October 8, 2014, and any objections to the data requests within 5 calendar days, or by October 6, 2014.

Thank you.

Whitney A. Birk |
Paralegal | Fennemore
Craig, P.C.
2394 East Camelback
Road, Suite
600 | Phoenix, AZ
85016
Tel: 602.916.5720 |
Fax: 602.916.5920 |
Mobile: 480.225.2089

<2nd set of data
requests to Venues
Cafe.pdf>

<9562275_1(BMSC -
2nd DRs to Venues
Cafe).doc>

<COVER LETTER TO BMSC RE DATA
REQUESTS 10 12 14.docx>

<C34 to BMSC RESPONSE TO DATA
REQUESTS.doc>

<C34 to BMSC DATA REQUEST 10 12 14.doc>